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LEGAL OPINION

Bonus backlash as sex rears its head

How can employers stand up to Harriet Harman's concerns about sexist bonuses?

Minister for women Harriet Harman has asked the Equality Commission to examine whether City bonuses discriminate against women. She describes the bonus system as a "licence for unfairness and discrimination" amid statistics that men in the finance sector are paid 40% more than women. But is sex discrimination really the reason for women being paid lower bonuses than men?

Bonuses are a fundamental element of remuneration in the finance sector. Banks pay bonuses to reward good performance and to attract and retain talent. They incentivise excellence and ensure banks keep the best people.

Free market

In principle, employers can pay whatever bonuses they like. The bonus system is a vivid demonstration of a free-market economy. However, it is unlawful to use bonuses to discriminate on



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grounds such as sex, age, disability, religion or race.

Most employers are well aware of this fundamental moral and legal obligation, and most know the only acceptable justification for paying one employee a higher bonus than the other is performance against known criteria.

Men and women are different in lots of ways – apart from the obvious ones – and some of those differences have a bearing on performance. Women are better at multi-tasking. Men are better at chess.

Harman assumes the only reason a woman would be paid a lower bonus than a man is because she is a woman. Where is the evi-

dence that women receiving lower bonuses than men are performing at the same level?

This is important because when criteria for allocating bonuses lack transparency, problems arise and employers become vulnerable to discrimination claims.

The way employers pay bonuses determines how they will be treated in a legal context. Some are paid across the board to the whole company, some guaranteed under a contract of employment. Many are discretionary, based on individual and business unit performance.

Most sex discrimination claims in relation to bonuses arise where a woman has been paid a lower discretionary bonus than a male comparator – frequently because she is pregnant, or due to absence on maternity leave.

Believing something to be true and being able to prove it at an employment tribunal are not the same. Nonetheless, employers often settle sex discrimination claims to avoid unwelcome publicity and the expense of tribunal proceedings.

Objective bonuses

Generally, employers can minimise the risk of bonus-related sex discrimination claims by publishing objective written criteria for bonus

awards and, on an individual level, by detailed explanation of bonus decisions. If not, employers must be prepared to explain and account for disparities.

Can an employer reduce a bonus payment because an employee is or has been absent on maternity leave for part of the bonus year? That depends on the employer's scheme. If employers wish to pro-rate bonuses while women are away on maternity leave, bonus schemes should be performance-related and employees must be in 'active service' on bonus payment dates.

The proposed Equality Bill will ban the 'secrecy clauses' in employment contracts that prevent employees disclosing their bonuses. If Harman's enquiry leads to legislation controlling bonuses, then employers with well-drafted bonus schemes and a record of rewarding employees for good performance should have nothing to fear.

*Additional material by
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KEY POINTS

- The government claims bonus culture is discriminatory against women, but has not produced any hard evidence.
- Bonuses are for good performance – employers can pay what they like, subject to certain legal restraints.
- It is unlawful to use bonuses to discriminate on the grounds of sex.
- Employers should specify objective bonus criteria and make discretionary bonuses more transparent.

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